

**UNITED STATES DISTRICT COURT**  
**FOR THE SOUTHERN DISTRICT OF NEW YORK**

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MICHAEL WARD,

d/b/a BRAINTEASER PUBLICATIONS,

Plaintiff,

**Civil Action No. 13-cv-7851 (JMF)**

-against-

BARNES & NOBLE, INC.,

STERLING PUBLISHING CO., INC.,

FRANCIS HEANEY, AND

PATRICK BLINDAUER,

Defendants.

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**DECLARATION OF BARRY JANAY IN OPPOSITION TO DEFENDANTS' MOTION**  
**FOR SUMMARY JUDGMENT**

BARRY E. JANAY, an attorney admitted to practice law in the State of New York and before this District Court declares and states as follows under penalty of perjury:

1. I am the attorney of record for the Plaintiff in the above-captioned action and I have personal knowledge of all the facts and circumstances giving rise to this action and those contained in this declaration.

2. I submit this declaration in opposition to Defendants' motion for summary judgment.

3. Attached hereto as Exhibit "A" is a true and correct copy of a letter from Plaintiff's New Zealand publisher, Gordon and Gotch (N.Z.) Limited, describing Plaintiff's success on the New Zealand market, dated November 20, 1998 (WARD000031).

4. Attached hereto as Exhibit "B" is a true and correct copy of an email chain between Plaintiff Ward and Peter Gordon, the Editorial Director at Sterling, negotiating the terms of their publishing arrangement (DEFS000234 - 248).

5. Attached hereto as Exhibit "C" is a true and correct copy of the July 09, 2004 email sent to Plaintiff Ward by Peter Gordon, the Editorial Director at Sterling, outlining the terms Sterling agreed to in order to become the exclusive publisher of Plaintiff Ward's puzzle books in the United States and Canada (WARD000042).

6. Attached hereto as Exhibit "D" is a true and correct copy of the September 24, 2008 email sent to Plaintiff Ward by Peter Gordon, the Editorial Director at Sterling, outlining Sterling's plans to continue selling Plaintiff Ward's puzzle books in the United States and Canada (WARD000088).

7. Attached hereto as Exhibit "E" is a true and correct copy of the June 6, 2009 email sent to Plaintiff Ward by Peter Gordon, the Editorial Director at Sterling, stating that Sterling had sold over a million copies of Plaintiff Ward's puzzle books in the United States and Canada (WARD000089).

8. Attached hereto as Exhibit “F” is a true and correct copy of an excerpt from an interview with Peter Gordon, the Editorial Director at Sterling, published in the New York Times on May 18, 2009 (WARD000026).

9. Attached hereto as Exhibit “G” is a true and correct copy of the October 14, 2012 letter sent to by Tony Romano, the Royalty Accounting Manager at Sterling, to Plaintiff which stated that Sterling had sold over 1.5 million copies of Plaintiff Ward’s puzzle books in the United States and Canada, and that Sterling will continue to print and sell these books (WARD000090).

10. Attached hereto as Exhibit “H” is a true and correct copy of an email chain ranging from September 13, 2013 to April 29, 2013, between various Sterling employees and Plaintiff Ward regarding Andrews McMeel Publications, LLC’s alleged copyright and trade dress infringement (DEFS002723-739).

11. Attached hereto as Exhibit “I” is a true and correct copy of a draft Publishing Agreement, drafted by Sterling, for the publishing of a work authored by Plaintiff Ward and tentatively entitled *Scratch & Solve Underwater Hangman*, dated August 5, 2013. Plaintiff refused to enter into this draft agreement (DEFS002782-2787).

12. Attached hereto as Exhibit “J” is a true and correct copy of a draft release, drafted by Sterling, entitled *RELEASE*, and presented to Plaintiff Ward as a condition precedent to entering into the draft August 5, 2013 Publishing Agreement. Plaintiff refused to sign this release (DEFS002755).

13. Attached hereto as Exhibit “K” is a true and correct copy of printout from Barnes & Noble’s website reflecting an online book search for “scratch hangman mike ward,” accessed and dated August 8, 2013, available at

[www.barnesandnoble.com/s/scratch0hangman-mike-ward?csrfToken=Bui3gYwpaxZmVUowSZsAulBXjkVOZcPi&sort=SA&size=40&crsftoken=Bui3gYwpa](http://www.barnesandnoble.com/s/scratch0hangman-mike-ward?csrfToken=Bui3gYwpaxZmVUowSZsAulBXjkVOZcPi&sort=SA&size=40&crsftoken=Bui3gYwpa) (WARD000003-4).

14. Attached hereto as Exhibit “L” are true and correct copies of printouts from Sterling’s and Amazon’s websites reflecting unauthorized “Scratch & Solve” books published by Sterling under Francis Heaney, Patrick Blindauer, and pseudonym “Jack Ketch”, accessed and dated August 8, 2013, available by searching at <http://www.amazon.com> and <http://www.sterlingpublishing.com> (WARD000005-11).

15. Attached hereto as Exhibit “M” are true and correct copies of printouts from Amazon’s, Epinions’, and Barnes and Noble’s websites reflecting numerous customer reviews of books from Plaintiff Ward’s “Scratch & Solve Hangman” series, accessed and dated August 8, 2013, available by searching at <http://www.amazon.com>, <http://www.epinions.com>, and <http://www.barnesandnoble.com>. (WARD000012-20).

16. Attached hereto as Exhibit “N” is a true and correct copy of an email chain between Plaintiff Ward and Sterling employees, Theresa Thomas and Peter Gordon, ranging from April 29, 2013 to June 12, 2013, where Plaintiff complained to Sterling about publishing his book series without sharing the profits with Plaintiff and without the authorization of Plaintiff (WARD000060-65).

17. Attached hereto as Exhibit “O” is a true and correct copy of an email chain between Plaintiff Ward and Sterling employees, Peter Gordon and Theresa Thompson, ranging from June 15, 2013 to June 26, 2013, where Defendant Sterling offered Plaintiff to resume publishing Plaintiff’s “Scratch & Solve” Hangman series under a new book (WARD000066-67).

18. Attached hereto as Exhibit “P” is a true and correct copy of an email chain between Plaintiff Ward and Sterling employees, Peter Gordon and Gillian Berman, ranging from August 20, 2013

to September 18, 2013, where Plaintiff refused to enter into the Draft 2013 Agreement, as well as the RELEASE (DEFS002766-2769).

19. Attached hereto as Exhibit “Q” is a true and correct copy of “Scratch Hangman” titles both authorized, and unauthorized by Plaintiff Ward, ranging from September 2005 to September 2013 (WARD000084).

20. Attached hereto as Exhibit “R” is a true and correct copy of an email chain between Plaintiff Ward and Sterling’s staff regarding Plaintiff’s refusal to sign the draft 2013 Agreement and Release (DEFS002723-2731).

21. Attached hereto as Exhibit “S” is a true and correct copy of Defendants’ Answer to Complaint and Affirmative Defenses, dated November 27, 2013.

22. Attached hereto as Exhibit “T” is a true and correct copy of a printout from the Intellectual Property Office of New Zealand, accessed and dated December 23, 2013, available at <http://www.iponz.govt.nz/cms/copyright/what-is-copyright> (WARD000027).

23. Attached hereto as Exhibit “U” is a true and correct copy of Defendants’ Rule 26(a)(1) Initial Disclosures, dated December 24, 2013.

24. Attached hereto as Exhibit “V” is a true and correct copy of a printout from the Intellectual Property Office of New Zealand's website, accessed and dated January 10, 2014, available at <http://www.iponz.govt.nz/cms/copyright/legal> (WARD000022).

25. Attached hereto as Exhibit “W” is a true and correct copy of a printout from the World Trade Organization’s website, accessed and dated January 10, 2014 available at [http://www.wto.org/english/thewto\\_e/countries\\_e/usa\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/usa_e.htm) (WARD000023-024).

26. Attached hereto as Exhibit “X” are true and correct copies of printouts from Sterling’s website reflecting various books published under Plaintiff Ward’s name in Sterling’s “Scratch & Solve” Hangman series, accessed and dated February 12, 2014, available at <http://sterlingpublishing.com/catalog>, where it is admitted that Plaintiff assigned the “Scratch & Solve” series to Sterling (DEFS00009-16, 21-23, WARD00021).

27. Attached hereto as Exhibit “Y” are true and correct copies of printouts from Barnes & Noble’s website reflecting various “Scratch & Solve” books published by Sterling under Plaintiff Ward’s name, accessed and dated February 12, 2014, available at <http://www.barnesandnoble.com>. Here, it is admitted that Plaintiff assigned the title to Sterling (DEFS000038, 041, 050, 059, 071, 084).

28. Attached hereto as Exhibit “Z” is a true and correct copy of the deposition transcript of Michael Ward, taken on March 20, 2014, along with the entire word index.

29. Attached hereto as Exhibit “AA” is a true and correct copy of a printout of the official website of the United States Copyright Office, searched under the search term “Ward, Mike,” and displaying all copyrights found under that search term, accessed and dated April 1, 2014 (WARD000086).

30. Attached hereto as Exhibit “BB” is a true and correct copy of the Order and Opinion Denying a Motion to Dismiss, issued by the honorable PAUL A. CROTTY filed on August 1, 2014, in the matter between Plaintiff and third-party Andrews McMeel Publishing, LLC (*Ward v. Andrews McMeel Pub., LLC*, 963 F. Supp. 2d (S.D.N.Y. 2013) (No. 12-cv-07987-PAC) (WARD000068).

31. Attached hereto as Exhibit “CC” is a true and correct copy of a printout from the Copyright Council of New Zealand’s website, available at <http://www.copyright.org.nz>.

32. Attached hereto as Exhibit “DD” is a true and correct copy of United States Copyright Registration Form SE, available at <http://www.copyright.gov/forms/formse.pdf>.

33. Attached hereto as Exhibit “EE” is a true and correct copy of an email chain between Plaintiff Ward and Peter Gordon, the Editorial Director at Sterling, where Plaintiff provided extensive advice to Sterling when they developed the design of the interior and exterior of the Scratch & Solve Series (DEFS000387-389).

34. Attached hereto as Exhibit “FF” is a true and correct copy of a side by side comparison of the instructions from the Mike Ward “Tough Hangman” title and the “Jack Ketch” “Science Hangman Title.”

35. Upon information and belief, Sterling did not obtain copyright protection under its own name to any of the “Scratch & Solve” series books.

I declare under penalty of perjury that the foregoing is true and correct.

/Barry E. Janay /

BARRY E. JANAY (BJ9311)

Executed: June 23, 2014